2005

Robert Radakovich, Ellen R. Radakovich, The Robert Radakovich Marital and Family Trust v. Cornaby : Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

ROBERT RADAKOVICH, individually and ROBERT RADAKOVICH and ELLEN R. RADAKOVICH, Trustees of THE ROBERT RADAKOVICH MARITAL AND FAMILY TRUST, Plaintiffs/Appellees, vs. MATTIE CORNABY, AL CORNABY, individuals, and WILLIAM ARGYLE CORNABY TRUST and MATTIE CORNABY TRUST, and JAY BARNEY CORNABY, DALE BARNEY, GAYLENE C. ROSENTHAL, ALBERT CORNABY, TRUSTEES Defendants/Appellants.	**APPELLEE'S BRIEF** **Case No. 20050911-CA** District Court No. 020700486

Appeal from a Decision of the Seventh Judicial District Court
Judge Bryce K. Bryner

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JURISDICTION

The Supreme Court had jurisdiction over the appeal of the Motion to Reconsider pursuant to U.C.A. 78-2-2(3)(j). Under U.C.A. 78-2-2(4), the Supreme Court has transferred the appeal of the Motion to Reconsider to the Court of Appeals, which possesses jurisdiction over matters so transferred pursuant to U.C.A. 78-2a-3(2)(j).

ISSUES AND STANDARDS OF REVIEW

Issues

The issue before the court is not as stated in the Appellant's Brief.

The issue before the court is whether the trial court abused its discretion in determining that the Defendants/Appellants (hereafter referred to as "Defendants," "Appellants" or "Cornaby") did not provide justification for the trial court to reconsider the Order Granting Plaintiffs' Motion for Summary Judgment, Granting Plaintiffs' Motion to Strike, and Denying Defendants' Countermotion for Summary Judgment (hereafter referred to as "Order" or "Summary Judgment Order").

Standards of Review

Motion to Reconsider

On appeal, a trial court's denial of a Motion to Reconsider under Rule 60(b) is reviewed under an abuse of discretion standard. See Timm v. Dewsnup, 921 P.2d 1381 (Utah 1996); Franklin Covey Client Sales, Inc. v. Melvin, 2 P.3d 451 (Utah App. 2000). "We grant broad discretion to the trial court's rule 60(b) rulings because most are equitable in nature, saturated with facts, and call upon judges to apply fundamental principles of

fairness that do not easily lend themselves to appellate review." Fisher v. Bybee, 104 P.3d 1198, 1200 (Utah 2004).

Motion to Clarify

Cornaby filed a document with the trial court entitled Motion to Clarify and/or Reconsider. This Motion to Clarify and/or Reconsider is comprised of two arguments, one requesting reconsideration, and the other requesting the alteration, amendment, or clarification, of the February 24, 2005 Summary Judgment Order. Cornaby's request for alteration, amendment, or clarification, was not preserved for appeal in the trial court.

Utah Rule of Civil Procedure 59(e) states that a motion to clarify an order must be brought within 10 days of the entry of the order. Rule 59(e) states: "A motion to alter or amend the judgment shall be served not later than 10 days after the entry of the judgment." Cornaby, on this appeal seeks to have the trial court amend, alter, or clarify the trial court's Summary Judgment Order. (See Appellants' Brief, "Issues" and generally). Cornaby's purported Motion to Clarify, however, was never properly presented to the trial court under Rule 59(e) as required. Cornaby has conceded that no Rule 59 motion was ever brought before the trial court. (Docketing Statement, page 2; Cornaby's Response to Appellees' Motion for Summary Disposition, generally; Appellants' Brief, Determinative Provisions, page 4). Further, the Motion to Reconsider containing the motion to clarify was not brought within 10 days. Cornaby cannot appeal an issue that was never properly presented to the trial court. The purported clarification issue has not been preserved for appeal.

DETERMINATIVE PROVISIONS

Rule 7(f) of the Utah Rules of Civil Procedure (See Tab A of Addendum)

Rule59(e) of the Utah Rules of Civil Procedure (See Tab A of Addendum)

Rule 60(b) of the Utah Rules of Civil Procedure (See Tab A of Addendum)

Rule 4(a) of the Utah Rules of Appellate Procedure (See Tab B of Addendum)

Rule 33 of the Utah Rules of Appellate Procedure (See Tab B of Addendum)

STATEMENT OF THE CASE

Nature of the Case

Cornaby purports to appeal the August 31, 2005 Ruling by Judge Bryce K. Bryner denying Cornaby's Motion to Reconsider. Cornaby's Docketing Statement and Appellants' Brief, however, make clear that Cornaby is using the Motion to Reconsider as a back door maneuver to appeal the trial court's February 24, 2005 Summary Judgment Order. In this appeal, Cornaby directly argues that the trial court's Summary Judgment Order granting the Appellees' a sixty foot wide right of way to access their property was improper. The Summary Judgment Order, however, is not on appeal, nor can it be appealed at this late date.

While Cornaby directly attacks the trial court's non-appealable Summary Judgment Order, Cornaby makes no serious argument to appeal the Motion to Reconsider, which is the only issue on appeal. Cornaby does not show, or even argue, the existence of an underlying justification for the Motion to Reconsider under Rule 60(b)(6). Consequently, Cornaby fails to address the actual issue on appeal, which is whether the trial court abused its discretion, not in granting summary judgment, but rather, in denying the Motion to Reconsider.

Course of Proceedings

Radakovich filed his Amended Complaint in October 2003 seeking to enforce a 60 foot wide right of way providing access to Radakovich property. (Rec. 30-35). Radakovich filed a Motion for Summary Judgment and a Motion to Strike affidavit statements in June 2004. (Rec. 41-42). Cornaby cross motioned for summary judgment in June 2004. (Rec. 89-90). The trial court received all the parties' filings and heard oral argument on November 22, 2004. (Rec. 282-283; November 22, 2004 Transcript [incorrectly dated 2005]). After over two months of considering the evidence presented, the trial court issued a Ruling on February 1, 2005 granting Radakovich's Motion for Summary Judgment and Motion to Strike, and denying Cornaby's Cross-motion for Summary Judgment. (Rec. 296-301). The Findings of Fact, Conclusions of Law, and Order Granting Plaintiffs' Motion for Summary Judgment, Granting Plaintiffs' Motion to Strike, and Denying Defendants' Countermotion for Summary Judgment was signed on February 24, 2005. (Rec. 304-309).

On March 14, 2004, Cornaby filed the Motion to Clarify and/or Reconsider. (Rec. 312-313). Contrary to the Cornaby's present contention, the Motion to Reconsider was not filed under Rule 60(b). (Rec. 312-313, 314-328). The Motion to Reconsider was fully briefed, and oral arguments were heard on June 2, 2005. (Rec. 414-415, June 2, 2005 Transcript). Thereafter, the court requested and received supplemental memoranda as to the legal justification for Cornaby's Motion to Reconsider. (Rec. 421-437, 438-447; June 2, 2005 Transcript page 39). After roughly 3 months of considering the evidence presented, the trial

court issued a Ruling on August 31, 2005 holding that Cornaby failed to provide justification for the Motion to Reconsider, and denied the Motion to Clarify and/or Reconsider. (Rec. 460-461).

On or about October 31, 2005, Radakovich filed a Motion for Summary Disposition arguing that Cornaby is actually appealing the Summary Judgment Order under the guise of appealing the Motion to Reconsider. (See Motion and Memorandum for Summary Disposition). On November 29, 2005, the Court of Appeals denied the Motion for Summary Disposition, but stated that "the appeal is necessarily narrow in scope." (Court of Appeals November 29, 2005 Order).

Statement of Facts

The facts relevant to the actual issue on appeal are limited to the facts justifying or not justifying the Motion to Reconsider under Rule 60(b). Cornaby does not discuss the facts relevant to the Motion to Reconsider, but instead, presents purported "facts" relating to the summary judgment. Although the facts relating to the summary judgment are not relevant to the limited issue on appeal, Cornaby's inclusion of such purported "facts" may improperly influence the Court if not briefly addressed. Therefore, the facts relating to the right of way, as found by the trial court, are included below.

The trial court granted summary judgment in favor of Radakovich finding that no genuine issues of material fact exist. (Rec. 296-301, 304-309). The trial court ruled that there was no dispute that H.B. Simonsen conveyed his property by Warranty Deed to

Radakovich in 1964. (Rec. 305). The trial court ruled that there was no dispute that Radakovich purchased the property and a sixty foot wide right of way from H.B. Simonsen in 1964. (Rec. 46, 305, 300). The trial court ruled that there was no dispute that H.B. Simonsen conveyed a 60 foot wide right of way by Warranty Deed in 1964, which right of way provided access to Radakovich's property. (Rec. 305). The trial court ruled that there was no dispute that the right of way ran over Cornaby's property, which had been previously owned by Elrie Simonsen. (Rec. 309). The trial court ruled that there was no dispute that Radakovich had used the right of way to access his property, since purchasing his property in 1964. (Rec. 68, 49, 300).The trial court ruled that there was no dispute that Cornaby's predecessor, Elrie Simonsen, acknowledged the existence of Radakovich's sixty foot wide right of way. (Rec. 157-158, 300). The trial court ruled that there was no dispute that Elrie Simonsen did not deed his property to William Cornaby until 1972. (Rec. 49, 300). The trial court ruled that there was no dispute that Cornaby's predecessor, William Cornaby, also acknowledged the existence of Radakovich's sixty foot wide right of way. (Rec. 157-158, 300). The trial court ruled that there was no dispute that it was only after William Cornaby died that the dispute regarding the width of the right of way arose. (Rec. 157-158, 300). The trial court ruled that there was no dispute that the right of way was sixty feet wide from as early as the early 1960's, which is when Radakovich purchased the property, including a sixty foot wide right of way. (Rec. 300, 49, 81-88). The trial court ruled that there was no dispute that res judicata had no application in this case. (Rec. 298-

300).

The trial court ordered the preparation of an appropriate order. (Rec. 300). The proposed order was sent to Cornaby for review prior to being submitted to the trial court. (Rec.302-303). Cornaby failed to object to any portion of the proposed order. (Rec 308-309). The proposed order was submitted to the trial court as required under Rule 7. (Rec. 300). The trial court entered an Order which, among other things, stated:

> 5. The right of way which now exists and has existed for many years, and which provides access to the Plaintiffs' property over the Defendants' property, is confirmed as and shall be sixty feet wide throughout its length.
> 6. Plaintiffs are entitled to construct fences marking the sixty foot wide right of way from the entrance of the right of way to the point at which it accesses Plaintiffs' property.

(Rec.309).

At least fifteen days after entry of summary judgment in favor of Radakovich, Cornaby filed a Motion to Reconsider. (Rec. 312). Cornaby's Motion and Memorandum to Reconsider cites to no Rule of Civil Procedure under which the Motion to Reconsider is brought. (Rec. 312-328). Radakovich highlighted this failure in the Memorandum in Opposition to the Defendants' Motion to Reconsider. (Rec. 386-395). Even after having this failure highlighted, Cornaby again failed to cite any Rule of Civil Procedure as a basis for the Motion to Reconsider in the Reply Memorandum. (Rec. 396-401). In fact, in the Reply Memorandum, Cornaby affirmatively states that the Motion to Reconsider "is not governed by the Utah Rules of Civil Procedure," but rather, was before the trial court "as

part of the court's inherent powers." (Rec. 398). At no time in the briefing of the Motion to Reconsider, did Cornaby ever cite to any subparagraph of Rule 60(b) as a basis for the Motion to Reconsider. (Rec. 312-328, 396-401). These sub-paragraphs, which if shown, may justify a Rule 60(b) motion are as follows:

> 1) mistake, inadvertance, surprise, or excusable neglect;
> 2) newly discovered evidence, which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
> 3) fraud, . . . misrepresentation or other misconduct of an adverse party;
> 4) the judgment is void;
> 5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
> 6) any other reason justifying relief from the operation of the judgment.

Utah Rule of Civil Procedure, Rule 60(b).

At oral arguments on the Motion to Reconsider, Cornaby again failed to provide any Rule 60(b) basis for the Motion to Reconsider. (June 2, 2005 Transcript). Since oral argument on the matter, Cornaby has asserted that the Motion to Reconsider should be considered a Rule 60(b)(6) motion. (Rec. 448-457). At the conclusion of the oral argument, Cornaby requested allowance to file a supplemental memorandum, presumably to show legal support justifying the re-argument of the merits of the case. (June 2, 2005 Transcript , page 39). The trial court ordered both parties to submit supplemental

memorandum concurrently within 10 days of the oral argument. (June 2, 2005 Transcript , page 39-40). In Cornaby's supplemental memorandum, Cornaby cited Rule 60(b)(6) for the first time in the entire briefing history of this case, as a basis for reconsideration. (Rec. 448-457). However, in none of the 10 pages of Cornaby's supplemental memorandum did Cornaby ever provide a Rule 60(b)(6) ". . . reason justifying relief from the operation of the judgment." (Emphasis added). (Rec. 448-457).

Finally, Cornaby never filed a Rule 59 motion even thought the Motion to Reconsider asked the trial court to amend, alter or clarify the February 24, 2005 Summary Judgment Order. (Docketing Statement, page 2; Cornaby's Response to Appellees' Motion for Summary Disposition, generally; Appellants' Brief, Determnative Provisions, page 4; Rec. 310-end). Rule 59(e) states that "a motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment." Utah Rules of Civil Procedure, Rule 59(e). Cornaby's request to clarify contained in the Motion to Reconsider cannot be construed as having been brought under Rule 59, as it was not filed within the 10 days allowed. (Rec. 314).

SUMMARY OF ARGUMENT

Contrary to Cornaby's Appellants' Brief, the issue is not whether the trial court abused its discretion in "granting summary judgment to appellees." (Appellants' Brief, page3; Docketing Statement, page 2). The issue is also not whether the trial court abused its discretion in purportedly "fail[ing] to rectify an erroneous easement description in a

judgment." (Appellants Brief, page 12). And, the issue is not whether the trial court "fail[ed] to . . . fulfill[ ] its gap-filling duty . . . by specify[ing] a [more precise] location" of the right of way. (Appellants Brief, page 17). The only issue on appeal is whether the trial court abused its discretion in determining that Cornaby did not provide justification for the Motion to Reconsider the trial court's Summary Judgment Order. (Rec. 460-461).

Cornaby failed to appeal the trial court's Summary Judgment Order within the 30 days allowed by Rule 4(a) of the Utah Rules of Appellate Procedure. Because Cornaby cannot appeal the summary judgment directly, Cornaby is seeking to appeal the Summary Judgment Order under the guise of appealing Cornaby's Motion to Reconsider. Cornaby has mis-stated the issue on appeal in an attempt to make an untimely and inappropriate appeal of the trial court's Summary Judgment Order. This back door attempt to make an unauthorized appeal should be rejected. Utah law does not allow a party to mis-use a Motion to Reconsider to appeal the merits of a non-appealable summary judgment.

Cornaby's Motion to Reconsider failed because it was not authorized under Utah law. Cornaby failed to show any basis for reconsideration under Rule 60(b)(6). Cornaby never showed any "extraordinary circumstances" under which Cornaby could purportedly justify relief from the trial court's Summary Judgment Order. (Rec. 46-461). Even in Cornaby's Appellants' Brief, Cornaby fails to provide any basis for relief under Rule 60(b)(6). The Appellants' Brief cites to Rule 60(b)(6) as a basis, but completely fails to support that citation by providing any "reason justifying relief from the operation of the

judgment." Utah Rule of Civil Procedure 60(b)(6). Instead, Cornaby merely re-argues the merits of the case as if appealing the Summary Judgment Order. Rule 60(b) does not allow a party to re-argue the merits of the case, especially when the time for appealing the merits of the case have passed.

Cornaby's request to clarify contained in the Motion to Reconsider also fails because it is not properly before the Court on appeal. A motion to alter or amend a judgment must be made under Rule 59(e) within 10 days of the entry of the order. The Motion to Clarify and/or Reconsider was not filed within the 10 days allowed, and was never properly brought before the trial court. The trial court did not abuse its discretion by rejecting a motion that was not properly before it. "Issues not raised in the trial court in a timely fashion are deemed waived, precluding (the appellate court) from considering their merits on appeal." Lebaron & Assoc., Inc., v. NEC Information Systems, Inc., 823 P.2d 479, 483 (Utah 1991). In addition, Cornaby has admitted that the appeal is brought under Rule 60, not Rule 59(e). Finally, even if the request to clarify were properly before the Court, the trial court's Summary Judgment Order sufficiently describes the dominant estate, the servient estate, the width, the length, and the location of the right of way, making clarification unwarranted.

ARGUMENT

I. THE TRUE ISSUE ON APPEAL IS NOT WHETHER THE SUMMARY JUDGMENT WAS PROPER, BUT RATHER, WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REJECTING THE MOTION TO RECONSIDER.

That this appeal is a back door attempt to appeal the merits of the trial court's summary judgment is not only clear from the facts of the case, but is also clear from the Appellants' Brief. The Appellants' Brief mis-states the supposed issue on appeal as "whether the trial court abused its discretion when it denied the Cornaby's Motion to Clarify and/or Reconsider its Order of February 24, 2005, granting summary judgment to Appellees and denying it to the Cornabys, despite the fact that the Order is both unenforceable and incomplete." (Appellants' Brief, Issues, page 3)(Emphasis added). Cornaby's Docketing Statement also confirms that the true focus of the appeal is the trial court's summary judgment by stating: "Issue on Appeal: Whether the trial court abused its discretion when it denied the Cornaby's Motion to Clarify and/or Reconsider its Order of February 24, 2005, granting summary judgment to Appellees and denying it to the Cornabys, despite the fact that the [summary judgment] Order misconstrued a 1969 Order regarding the same properties, failed to apply res judicata and lacked evidentiary support." (Docketing Statment, Issue on Appeal, page 2). The real focus of this appeal is not the Motion to Reconsider, but rather, the merits of the Summary Judgment Order.

Utah courts have consistently held that where a Rule 60(b) motion is appealed, the appeal does not reach the merits of the underlying judgment from which relief was sought. See Fisher v. Bybee, 104 P.3d 1198 (Utah 2004); Franklin Covey Client Sales, Inc. v. Melvin, 2 P.3d 451 (Utah App. 2000). In Fisher, the Utah Supreme Court stated: "Even when an

order on a Rule 60(b) motion is appealable, the appeal is narrow in scope. An appeal of a Rule 60(b) order addresses only the propriety of the denial or grant of relief. The appeal does not, at least in most cases, reach the merits of the underlying judgment from which relief was sought. Appellate review of Rule 60(b) orders must be narrowed in this manner lest Rule 60(b) become a substitute for timely appeals." 104 P.3d at 1201 (quoting Franklin Covey, 2 P.3d at 456).

The Motion to Reconsider is being appealed for one reason and one reason only, to serve as a back door to allow Cornaby to appeal the trial court's Order granting summary judgment, which is not appealable.

II. CORNABY NEVER PROVIDED THE TRIAL COURT A REASON JUSTIFYING THE MOTION TO RECONSIDER . THE TRIAL COURT, THEREFORE DID NOT ABUSE ITS DISCRETION IN REJECTING THE MOTION TO RECONSIDER.

The Appellants' Brief and Docketing Statement are not the only indications of the true nature of Cornaby's appeal. The facts relating to the presentation of Cornaby's Motion to Reconsider also show that the only matters Cornaby has ever addressed were matters relating to the merits of the case on summary judgment, and not the justification for the Motion to Reconsider.

Cornaby never claimed to have filed a Motion to Reconsider under Rule 60(b)(6) until after initial briefing was complete on the Motion to Reconsider. In Cornaby's own Reply Memorandum supporting the Motion to Reconsider, Cornaby affirmatively stated

that the Motion to Reconsider was not "governed by the Utah Rules of Civil Procedure," but rather, was before the trial court based on the trial court's "inherent" powers. (Rec. 398). Cornaby asserted that in "extraordinary circumstances" the court may "reconsider a ruling." (Rec. 461). In briefing and at oral argument, however, Cornaby, never presented any facts showing "extraordinary circumstances" which could purportedly justify a Motion to Reconsider. (Rec. 461, 312-328, 396-401, June 2, 2005 Transcript, 448-457). In the Motion to Reconsider, Cornaby merely made the same arguments which had already been rejected by the court on summary judgment. In addition, at oral argument, Cornaby never provided any "reason" to justify relief as required under Rule 60(b)(6). (June 2, 2005 Transcript).

Cornaby must do more than merely reference Rule 60(b)(1)-(6). See James v. Preston, 746 P.2d 799, 801-802 (Utah App. 1987); Lebaron & Assoc., Inc., v. NEC Information Systems, Inc., 823 P.2d 479, 483 (Utah 1991). Specifically, to claim Rule 60(b)(6) as justification for the Motion to Reconsider, Cornaby must provide a " reason justifying relief from the operation of the judgment." Utah Rules of Civil Procedure 60(b)(6)(emphasis added). A generic reference to Rule 60(b)(6) is not sufficient. Cornaby never provided any Rule 60(b)(6) "reason justifying relief," either during briefing or at oral argument on the Motion for Reconsideration. After oral argument on the Motion to Reconsider, the court requested supplemental memoranda, in which Cornaby first cites to Rule 60(b)(6) as a basis for the Motion to Reconsider. Cornaby's supplemental

memorandum gave no Rule 60(b)(6) "reason justifying relief," which under Utah law may include lack of due process or incompetent counsel (Rec. 448-457); Utah Rules of Civil Procedure 60(b)(6). A.G. v. State (In re Interest of A.G.), 27 P.3d 562, 564 (Utah App. 2001).

Utah law is clear that Rule 60 cannot be used merely to grant the losing party another chance to accomplish the task at which it just failed. See Haner v. Haner, 373 P.2d 577 (Utah 1962); Board of Educ. v. Cox., 384 P.2d 806 (Utah 1963); Warren v. Dixon Ranch Co., 260 P.2d 741 (Utah 1953). Cornaby used the Motion to Reconsider to merely re-argue the summary judgment matters which had already been rejected by the trial court. Cornaby was required under Rule 60(b)(6) to provide the trial court a "reason justifying relief," but he never did so. Because Cornaby never provided a reason justifying relief, the trial court correctly denied the Motion to Reconsider. (Rec. 461).

This pattern of failure to provide a Rule 60(b)(6) "reason justifying relief" is continued in Cornaby's Appellants' Brief. Although the Appellants' Brief generically refers to Rule 60(b)(6), Cornaby fails to cite any Rule 60(b) "reason" justifying the Motion to Reconsider. The appellant in Franklin Covey made a similar mistake. After failing to file a timely appeal, the Franklin Covey appellant challenged the denial of his Rule 60(b) motion. In holding that the trial court properly denied the Rule 60(b) motion, the Court of Appeals stated: "none of the relevant Rule 60(b)(1) grounds were properly presented in this appeal, and we will not countenance [the appellant's] attempt to use the 'back door' to obtain

review of the underlying judgments of the trial court after failing to timely file a Notice of Appeal challenging them." 2 P.3d at 458. In reaching this conclusion, the Court of Appeals noted that appellants notice of appeal for the underlying summary judgment was not timely filed. Id. at 457. The Court found that the appellant "attempted to use Rule 60(b) as a 'back door' to a direct appeal of the underlying judgments" because "[n]owhere in his motion, nor in the supporting memorandum, does he advance proper Rule 60(b)(1) grounds for relief from judgment." Id.

Like the appellant in Franklin Covey, Cornaby failed to provide the trial court any Rule 60(b)(6) grounds for the Motion to Reconsider, such as incompetent counsel or lack of due process. See Oseguera v. Farmers Ins. Exch., 68 P.3d 1008, 1010 (Utah App. 2003) (citing 11 Charles Alan Wright, et al., Federal Practice and Procedure § 2864 (2d ed. 1995); A.G. v. State (In re Interest of A.G.), 27 P.3d 562, 564 (Utah App. 2001). On appeal, Cornaby also fails to provide any Rule 60(b)(6) grounds for relief. Instead, Cornaby, in the Appellants' Brief, merely re-argues the merits of the case on summary judgment. Most importantly to this appeal, the Appellants' Brief provides no evidence to show that any Rule 60(b)(6) "reasons justifying relief" were presented to the trial court. Therefore, Cornaby fails to show that the trial court abused its discretion in denying the Motion to Reconsider.

The merits of the case on summary judgment are not relevant to this appeal. To appeal the Summary Judgment Order, Cornaby was required to file a Notice of Appeal

within 30 days of February 24, 2005. Utah Rules of Appellate Procedure, Rule 4. Cornaby's Notice of Appeal was filed on September 28, 2005, 7 months after summary judgment was granted. The Court of Appeals has no jurisdiction to hear an appeal of the merits of the summary judgment. See Serrato v. Utah Transit Auth., 13 P.3d 616, 618 (Utah App. 2000). The Court's jurisdiction is limited to whether the trial court abused its discretion in denying the Motion to Reconsider. See Franklin Covey Client Sales, Inc. v. Melvin, 2 P.3d 451, 456 (Utah App. 2000); see also, Court Order dated November 29, 2005.

III. RULE 60(B) DOES NOT EXIST MERELY TO GRANT THE LOSING PARTY ANOTHER CHANCE TO ACCOMPLISH THE TASK AT WHICH IT JUST FAILED.

As cited in Section II above, a motion under Rule 60(b) cannot be used merely to grant the losing party another chance to accomplish the task at which it just failed. Yet that is how Cornaby attempted to use the Motion to Reconsider in the trial court, and how Cornaby attempts to use the appeal now. This maneuver is not allowed by Utah law and should not be allowed by the Court. A motion under Rule 60(b) must have an underlying basis for being considered, such as:

1) mistake, inadvertance, surprise, or excusable neglect;
2) newly discovered evidence, which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
3) fraud, . . . misrepresentation or other misconduct of an adverse party;
4) the judgment is void;

> 5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
> 6) any other reason justifying relief from the operation of the judgment.

Utah Rule of Civil Procedure, Rule 60(b). As stated above, "[o]ther reasons[s] justifying relief" have included incompetent counsel and lack of due process. See Oseguera v. Farmers Ins. Exch., 68 P.3d 1008, 1010 (Utah App. 2003) (citing 11 Charles Alan Wright, et al., Federal Practice and Procedure § 2864 (2d ed. 1995); A.G. v. State (In re Interest of A.G.), 27 P.3d 562, 564 (Utah App. 2001). However, in no case has the mere re-argument of the merits of the case qualified as underlying basis justifying relief under Rule 60(b).

A. There must Be an Underlying Rule 60(b)(6) Basis for a Proper Rule 60(b)(6) Motion. Cornaby Never Provided an Underlying Rule 60(b)(6) Basis.

In Board of Educ. v. Cox., 384 P.2d 806 (Utah 1963), the trial court ruled that the defendants had been served with a complaint, had deliberately refused to answer the complaint, and therefore, the trial court entered judgment against the defendants. The defendants filed a Rule 60(b) motion to set aside the judgment asserting "mistake, inadvertence, surprise or excusable neglect" and "any other reason justifying relief." Utah Rules of Civil Procedure 60(b)(1) and (6). In support of the Rule 60(b)(6) "any other reason" prong, the defendants alleged that the contract was void under the statute of frauds, for lack of consideration, and because the judgment was inequitable. Id. at 807-808. The trial court

rejected the Rule 60 motion and the defendants appealed to the Utah Supreme Court. The Supreme Court explained that the Statute of Frauds and lack of consideration arguments are arguments "on the merits" and are not properly before the court on a Rule 60(b) motion.

> Appellant, in asserting the Statute of Frauds and lack of consideration has set forth defenses which apply to the merits of the case and have no application as to why appellant did not answer within the time allotted. We are concerned only with why he did not answer, not with what kind of answer would he give if he were so inclined.

Id. at 808. The Cox court made clear that "the merits of the case" which may include a Statue of Frauds or lack of consideration defense do not themselves provide a basis for a Rule 60 motion. There must be an underlying reason justifying a Rule 60(b) motion. Thus, in Fisher and Franklin Covey, the Courts stated "[a]n appeal of a Rule 60(b) order addresses only the propriety of the denial or grant of relief. The appeal does not, at least in most cases, reach the merits of the underlying judgment from which relief was sought." Fisher, at 1201 (quoting Franklin Covey, 2 P.3d at 456). Like the defendants in Cox, Fisher and Franklin Covey, Cornaby fails to cite any underlying reason to justify the Rule 60(b)(6) motion, such as incompetent counsel or lack of due process. Instead Cornaby attempts to argue the merits of the judgment or order. The issue on appeal, however, is not the merits of the trial court's summary judgment, but rather, whether the trial court abused its discretion in determining that Cornaby failed to justify the Motion to Reconsider by providing and underlying basis for relief under Rule 60(b)(6).

B. Rule 60(b) Provides a Basis for Relief in Limited Circumstances. If Unlimited, Rule 60(b) is Rendered Meaningless and Finality is Eliminated.

Rule 60, by its very nature, is intended to limit the circumstances where relief can be granted. To interpret subsection (b)(6) as allowing a party to merely re-argue the merits of the case would effectively eliminate the entire purpose of Rule 60, which is to allow relief from a judgment in limited circumstances only. If Rule 60(b) were unlimited, there would be no finality in the trial courts.

> There is, of course, a need for finality of judgments and orders. . .
> . . . [I]f the party ruled against were permitted to go beyond the rules, make a motion for reconsideration, and persuade the judge to reverse himself, the question arises, why should not the other party who is now ruled against be permitted to make a motion for *re*-reconsideration, asking the court to again reverse himself? Tenacious litigants and lawyers might persist in motions, arguments and pressures and theoretically a judge could go on reversing himself periodically at the entreaties of one or the other of the parties ad infinitum.

Watkiss & Campbell v. Foa, 808 P.2d 1061 (Utah 1991). Rule 60(b) should be interpreted to maintain the limiting purpose of Rule 60.

In Haner v. Haner, 373 P.2d 577 (Utah 1962), the Utah Supreme Court held that judgment should not be set aside merely to grant losing party another chance to accomplish task at which he has just failed. In Haner, the movant filed her motion to set aside and claimed that fraud had occurred. The Supreme Court, however, noted that in order to prevail on a motion to set aside, the fraud asserted must be fraud that "depriv[es] the other party of the opportunity to present his claim or defense." Haner, at 301. This same principle was set forth in Cox, where the Supreme Court, in upholding the trial court's rejection of the Rule 60 motion, cited long-standing law that:

> The allowance of a vacation of judgment is a creature of equity designed to relieve against harshness of enforcing a judgment, which may occur through procedural difficulties, the wrongs of the opposing party, or misfortunes which **prevent** the presentation of a claim or defense.

Cox, at 808 (citing Warren v. Dixon Ranch Co., 260 P.2d 741 (Utah 1953). In the case at bar, Cornaby fails to show any "procedural difficulties, . . . wrongs of the opposing party, or misfortunes which prevent[ed] the presentation of a claim or defense." Cornaby was fully heard on all the evidence and simply failed to prevail. There was no lack of due process, any argument alleging incompetent counsel or any other Rule 60(b)(6) underlying basis for a Motion to Reconsider. Therefore, the Motion to Reconsider was rightly rejected by the trial court.

Even at this late date, and even after the filing of the Appellants' Brief, Cornaby still fails to provide a basis for relief under Rule 60(b)(6). Cornaby again uses the Appellants' Brief as a second or third attempt to argue the merits of the summary judgment. The Haner court, in the strongest terms possible, prohibited such second or third chances. The Supreme Court held:

> This charge [the movant's argument] is simply a continuation of the same dispute which the trial was supposed to resolve. It is the purpose of the law to afford the parties full opportunity to have themselves and their witnesses present; and to present their evidence and their contentions to the court. When this has been done and the court has made its determination, that should end the matter, except for the right of appeal.

Id. at 578 (Emphasis added). The Haner court continued:

> It is so patent as to hardly justify comment that a judgment should not be set aside merely to grant the losing party another chance to accomplish the task at which he just failed: to prove that he was right and that the opponent was wrong. To reopen a case just because a party persists in asserting and attempting to prove that his version of the dispute was the truth and that of the opponent was false would open the door to a repetition of that procedure, whoever won the next time; and thus to keeping the dispute going ad infinitum with no way of determining when the merry-go-round of the law suit would end. This would involve not only a waste of time, energy and expense but also would result in such uncertainty as to people's rights that the very purpose of a law suit, the settling of disputes and putting them at rest, would be defeated. Resort to the courts would be frustrating and impracticable unless there were some point at which decisions became final so that parties could place reliance thereon, leave their troubles behind and proceed to the future. It is for these reasons that courts accord to judgments regularly entered a high degree of sanctity; and would overturn a judgment such as the instant one on the ground of fraud only if it were shown that the complaining party had been wrongfully deprived of the opportunity to meet and contest the issues at the trial.

Id. This principle is reflected in the Utah Rules of Civil Procedure, which only allows a court to set aside a judgment (Rule 60) or order a new trial (Rule 59) under certain limited circumstances, none of which include allowing a party to merely re-argue the merits of its case.

Cornaby's arguments that: 1) res judicata should have applied at summary judgment (Docketing Statement, Issue on Appeal, page 2); 2) the summary judgment Order lacked "evidentiary support" (Docketing Statement, Issue on Appeal, page 2); 3) the deeded right of way purportedly does not match the existing right of way or reach the Radakovich property (Appellants' Brief, page 7); 4) the Summary Judgment Order is "unenforceable and incomplete" (Appellants' Brief, Issues, page 3); or 5) any other similar argument relating to

the merits of the summary judgment, do not constitute an underlying basis for relief under Rule 60(b)(6).

In addition, these arguments are not relevant to the limited issue on appeal, which is the trial court's denial of the Motion to Reconsider. Cornaby has provided nothing to show that the trial court abused its discretion in denying the Motion to Reconsider.

IV. THE SUMMARY JUDGMENT ORDER IS NOT ON APPEAL, HOWEVER, EVEN IF IT WERE, THE SUMMARY JUDGMENT ORDER IS PROPER.

Cornaby's Appellants' Brief purports to present evidence that the sixty foot wide right of way granted in favor of Radakovich is "irreconcilable" with the 60 foot wide right of way Radakovich purchased in 1964. This argument is purportedly supported by Cornaby's drawings or pseudo survey, drawn not by a qualified surveyor, but rather, by a title searcher. Furthermore, even if Cornaby's purported survey were accurate, it is still irrelevant to the limited issue on appeal because it relates only to the merits of the summary judgment. The summary judgment is not on appeal, and cannot be appealed. The issue on appeal is whether the trial court abused its discretion in rejecting the Motion to Reconsider. No basis for reconsideration under Rule 60(b) was ever presented to the trial court, and therefore, the trial court did not abuse its discretion in rejecting the Motion to Reconsider.

Cornaby admits that the drawings and assertion of "irreconcilability" are based on the right of way description contained in the 1964 deed from Simonsen to Radakovich, and the present location of the Radakovich property boundary line. Both the description contained in the 1964 deed, and the Radakovich property boundary line were discoverable, available,

and in the possession of Cornaby before summary judgment was granted. Even if the Summary Judgment Order were validly on appeal, Cornaby cannot offer evidence on appeal which was available but never presented to the trial court. (Rec. 117-118; Rec. 123). If Cornaby believed such information was relevant to the merits of the case on summary judgment, Cornaby could easily have presented it to the trial court. Cornaby, however, did not present the trial court with the available evidence which he now seeks to present on appeal. Again, "[i]ssues not raised in the trial court in a timely fashion are deemed waived, precluding (the appellate court) from considering their merits on appeal." Lebaron & Assoc., Inc., v. NEC Information Systems, Inc., 823 P.2d 479, 483 (Utah 1991).

In addition, Cornaby's assertion that the trial court did not know that the described right of way in the 1964 warranty deed did not actually reach the adjusted Radakovich property boundary, and that therefore, the Summary Judgment Order is "irreconcilable", is incorrect. The trial court was fully aware that the boundary line between the Radakovich property and the Cornaby property, as described in the 1964 warranty deed, had been adjusted further to the south in the 1968 litigation. (Rec. 123). The trial court knew that the as a consequence of that 1968 adjustment, the right of way also described in the 1964 warranty deed no longer reached the newly established boundary to the Radakovich property. (Rec. 309, 305-307, 298-300). This fact was known by the trial court, and was, or at least should have been understood by Cornaby. A simple recognition

that the 1964 warranty deed boundary between the properties had been adjusted by the court in 1968 should have been sufficient to indicate that the right of way described in the same 1964 warranty deed no longer reached the newly established and adjusted boundary to the Radakovich property.

Cornaby's purported new "evidence" of irreconcilability is only new to Cornaby, not the trial court or Radakovich. The trial court, in its summary judgment, simply extended the 60 foot wide right of way purchased and used by Radakovich since 1964 so as to connect with the Radakovich property boundary, as adjusted in 1968. The trial court thereby corrected a problem that was created by the 1968 boundary line adjustment, but which was left unresolved until summary judgment was granted in 2005. Such a decision to extend the right of way to allow access to the Radakovich property was not improper.

More relevantly, the arguments that the right of way described in the 1964 warranty deed did not reach the Radakovich property boundary as adjusted: 1) do not relate to the issue on appeal; 2) do not provide a basis for Cornaby's Motion to Reconsider; and 3) do nothing to show an abuse of discretion in the denial of the Motion to Reconsider.

V. CORNABY'S PURPORTED MOTION TO CLARIFY IS NOT PROPERLY ON APPEAL. EVEN IF IT WERE, THE SUMMARY JUDGMENT ORDER SUFFICIENTLY DESCRIBES AND LOCATES THE RIGHT OF WAY.

A. Before the Trial Court Entered the Summary Judgment Order, Cornaby Was Given the Full Opportunity to Review, Alter, Amend or Otherwise Modify the Order.

Cornaby had the opportunity to object to and/or modify the Summary Judgment Order before it was submitted to the trial court for signing. Cornaby chose not to make any changes, additions or clarifications of the Order when given the opportunity, and instead allowed the trial court to sign the Order without objection. Utah Rules of Civil Procedure 7(f). Now, Cornaby asserts that the Order needs clarification and cannot be enforced. There is no basis for such an argument.

Cornaby cannot now complain of the form of the Summary Judgment Order which Cornaby assented to without objection before the trial court entered the Order. In Evans v. State of Utah, 963 P.2d 177, 180 (Utah 1998) the State was given the opportunity to object to the form of an order as allowed under Utah Rule of Civil Procedure 7(f), but the State failed to make an objection. The Supreme Court explained the consequences of failing to object to an order by stating that "[h]aving failed to properly object [to the form of the Order], the State waived its right to challenge the order . . . on appeal." Cornaby likewise waived the right to challenge the Summary Judgment Order on appeal. See also Nigohosian v. Nigohosian, WL 797721 (Utah App. 2004).

B. Cornaby Failed to File a Rule 59(e) Motion to Alter or Amend the Summary Judgment Order. This Issue Is Not on Appeal and Cannot Be Appealed.

Not only was Cornaby given the full opportunity to provide input as to the form of the Summary Judgment Order before it was signed and entered on February 24, 2005, but Cornaby also had 10 days after the entry of the Order to make a motion to amend or

clarify. Under Rule 59(e) "A motion to alter or amend the judgment shall be served not later than 10 days after the entry of the judgment." Utah Rule of Civil Procedure, Rule 59(e)(emphasis added). Cornaby made no such motion within the time period allowed. In rejecting a similarly disguised attempt to appeal the content of a non-appealable summary judgment order under the guise of Rule 60, the Utah Court of Appeals stated that any objection to the content of the summary judgment order "should have been raised in a timely motion to alter or amend the judgment under Rule 59(e) of the Utah Rules of Civil Procedure. . . ." Bonneville Billing & Collection v. Torres, 15 P.3d 112, 113 (Utah App. 2000). The purported motion to "clarify" was never properly before the trial court pursuant to Rule 59(e). Matters not properly presented to the trial court may not be raised on appeal. See James v. Preston, 746 P.2d 799, 801 (Utah App. 1987); Lebaron & Assoc., Inc., v. NEC Information Systems, Inc., 823 P.2d 479, 483 (Utah 1991). A party cannot appeal the trial court's handling of a matter that was never properly brought before the trial court.

C. The Summary Judgment Order Is Sufficiently Clear for Enforcement.

Even if the clarification issue had been properly presented to the trial court, and thereafter, properly preserved for appeal, Cornaby's arguments still fail. Cornaby asserts that the trial court's Summary Judgment Order must be more precise to be enforced. (Appellants' Brief, pages 17-18). There is no support for this argument.

The Summary Judgment Order acknowledges the present and long-standing existence of a right of way which runs over Cornaby's property and accesses Radakovich's property. (Rec. 309). The Summary Judgment Order states that the width of that presently existing right of way shall be sixty feet in width and shall be established by new fences. (Rec. 309). The trial court's Order is very clear as to the width of the right of way.

The length of the right of way granted in the trial court's Order is likewise clear. The trial court's Summary Judgment Order clearly states that from the sixty foot wide right of way begins from the point the existing right of way road enters Cornaby's property to the point it accesses Radakovich's property. (Rec. 309). There is no dispute as to the entrance and exit point of the right of way. Furthermore, the length of the easement is clear from the purpose of the easement. The easement exists for the purpose of providing Radakovich access to his property, and therefore, must be sufficient in length to provide such access. There can be no claim of confusion as to the length of the right of way in the trial court's Order.

The dominant estate, the servient estate, the width, length and location of the right of way are the essential terms of a right of way. This is confirmed in the Supreme Court's holding in Evans v. Board of County Commissioners, 123 P.3d 432 (Utah 2005) in which a similar right of way was not precisely described. The Supreme Court held that:

> Although certainly desirable in most instances, language fixing the location of an easement is not always necessary when other terms of the easement safeguard the servient estate from the risk that its burden may be greater than that for which it bargained.
>
> The facts of this case illustrate this point. The minimum extent of the servitude can be easily extracted from the text of the deed. The area of the servient estate . . . is precisely described, as is the width of the easement. . . . The minimum gross area of the strip subject to the servitude can be easily calculated by multiplying the length by the width. The dominant estate . . . is identified. The stated purpose of the easement . . . is clear. Whatever uncertainty the County may have about the ultimate location of the Evans' easement, the deed unambiguously communicated a full complement of data describing its minimum burden to the County's fee interest.

Evans, at 434-435. Like theEvans v. Board of County Commissioners case, the dominant estate, the servient estate, the length and the width of the right of way are clearly described in the trial court's Order.

In addition, unlike Evans v. Board of County Commissioners, the location of the right of way in the case at bar is also clear. In arguing the merits of the summary judgment, Cornaby admits the existence and the location of the present right of way. (Appellants' Brief, generally). Again, in arguing the merits of the summary judgment, Cornaby admittedly asserts that the right of way as presently bound by fences. (Appellants' Brief, page 7) Incidentally, Cornaby's assertion that the present right of way is 50 feet in width contradicts the trial court's finding that the right of way, from as early as the early 1960's, was sixty feet wide. (Rec. 300). In further argument relating to the merits of the summary judgment, Cornaby even provides an overhead picture of the right of way showing its location. (Appellants' Brief, page 6). The location of the present right

of way is not disputed. The trial court's Order locates the sixty foot right of way in the same location as the existing right of way. (Rec. 308-309). Unlike Evans v. Board of County Commissioners, the location of the sixty foot right of way on the Cornaby property cannot be seriously disputed.

Although Cornaby attempts to appeal the trial court's Summary Judgment Order locating the right of way on the existing right of way, that Order is not appealable. And while Cornaby may believe the trial court's Order was incorrect, that belief, which cannot be appealed, does not change the fact that the Order sufficiently located the right of way. Because the trial court's Order identifies the dominant and servient estates, and describes the width, length and location of the right of way, the Order is clear and needs no further "clarification." This is true even if the issue of clarification were properly before the Court on appeal, which it is not.

Finally, even if the trial court's Order did not sufficiently locate the right of way, the Evans v. Board of County Commissioners case clearly describes the remedy. If the Court of Appeals determines that the issue has been properly preserved and is appealable, and if the Court of Appeals determines that the Order does not identify the location of the right of way, the Supreme Court "conclude[d] that the most appropriate method to fix the site of the [right of way] is to assign to the [servient estate] the authority to select its location." Evans v. Board of County Commissioners, at 435. Radakovich would have no objection to Cornaby locating the placement of fences marking the sixty foot wide right of

way, as long as the fence locations were within the boundaries set by the Order – meaning that the fences must bound the existing right of way road in a reasonable manner to preserve width, length and purpose of the right of way. In fact, at oral argument on June 2, 2005, Radakovich offered to follow such a procedure. (June 2, 2005 Transcript, pages 31-32). The Supreme Court explained that "this approach to locating the unfixed easements has enjoyed general acceptance among courts and commentators. In adopting this approach we join a majority of jurisdictions that have confronted this issue." Evans v. Board of County Commissioners, at 436. Further, the Utah Supreme Court held that allowing the servient estate to locate the right of way is more appropriate than voiding the right of way. Evans v. Board of County Commissioners at 436. The Court also explained that "if the servient owner fails to make such a designation [of location] within a reasonable period, the easement holder may select a reasonable route. If the parties are unable to reach an agreement, a court may specify a location for an easement." Evans v. Board of County Commissioners, at 436.

The appeal relating to a clarification is meritless. Cornaby's refusal to acknowledge the trial court's Order and the insistence on a back door appeal have not provided Radakovich the opportunity to even begin building the fences ordered by the trial court. Cornaby has not requested anything different than the elimination of the trial court's Order. If the court determines that: 1) the clarity of the Order is appealable; and 2) the Order lacks sufficient detail to locate the right of way, then the appeal should still be

rejected, and Cornaby should be ordered to reasonably locate the right of way within the boundaries set by the trial court's Order. If Cornaby fails to reasonably locate the right of way, Radakovich should be given the right to reasonably locate the right of way. If that is not possible because of Cornaby's intransigence, the trial court's Order should be enforced by a court.

VI. RADAKOVICH SHOULD BE AWARDED ATTORNEYS FEES FOR THIS APPEAL.

Cornaby never presented a Rule 60(b)(6) basis for his Motion to Reconsider to the trial court. Cornaby never presented a Rule 59(e) motion to amend or alter the Summary Judgment Order to the trial court. On appeal, Cornaby failed to: 1) show that he provided the trial court a valid Rule 60(b)(6) basis for reconsideration; and 2) failed to address any valid Rule 60(b)(6) basis. In Debry v. Cascade Enterprises, 935 P.2d 499 (Utah 1997), an appellant was,

> [N]ot forthright in their presentation of the facts relevant to the appealability of the issue they seek to raise. They acted as if the trial court had not rejected, prior to the entry of its initial judgment, the very arguments the [appellants] have belatedly asserted in this appeal; and they have wholly ignored the fact that those arguments could and should have been raised on the prior appeal but were not. . . . The [appellants] have not even addressed the appealability of the setoff issue in light of their prior waiver of that issue. They have cited no authorities that provide a reasonable basis for such an appeal. . . . The [appellants] have failed to analyze the merits of the setoff issue in light of the escrow and nonmerger agreement. . . .

Similarly, Cornaby has presented, on appeal, no issues relevant to the actual issue on appeal. Instead, Cornaby argues issues which are not on appeal, such as the Summary

Judgment Order. Cornaby has not addressed the requirements of Rule 60(b)(6) either at the trial court level or the appellate level. Without addressing the actual issue on appeal, the appeal is frivolous and not warranted in law. Under these circumstances, Radakovich respectfully requests that attorneys fees and costs be awarded against Cornaby under Rule 33 of the Utah Rules of Appellate Procedure.

CONCLUSION

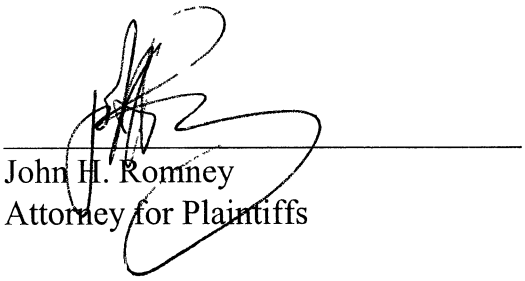
The trial court's Summary Judgment Order is not on appeal, nor is it appealable. Cornaby's attempt to use the Motion to Reconsider as a back door tactic to appeal the Summary Judgment Order should be rejected. The only issue properly on appeal is whether the trial court abused its discretion in determining that Cornaby failed to justify the Motion to Reconsideration under Rule 60(b)(6).

Cornaby never provided the trial court a "reason justifying relief" or any other reason under Rule 60(b)(6) to justify the Motion to Reconsider. The trial court, therefore, did not abuse its discretion in rejecting the Motion to Reconsider. Even on this appeal, Cornaby fails to present any evidence that the Motion to Reconsider was improperly rejected. In the Appellants' Brief, Cornaby generically references Rule 60(b)(6), but Cornaby still does not provide a "reason justifying relief." Instead, as Cornaby did at the trial court level, Cornaby merely re-argues the merits of the case, which arguments have already been presented to the trial court on two occasions and rejected. Cornaby failed to appeal the Summary Judgment Order, and therefore, cannot re-argue the merits of the

Summary Judgment Order on this purported appeal of the Motion to Reconsider. The Summary Judgment Order is not on appeal, and cannot be appealed. The Motion to Reconsider was properly rejected by the trial court, and Cornaby has provided no evidence or law to show an abuse of discretion by the trial court.

Cornaby's request to amend, alter or clarify is not properly before the Court on appeal. Cornaby assented to the form and entry of the Summary Judgment Order by the trial court without objection. Under Rule 59(e), Cornaby had 10 days to file a motion to alter or amend. Cornaby failed to do so. The trial court properly rejected the request to amend, alter or clarify the Order, and the issue is not properly on appeal. Furthermore, even if properly on appeal, the request to alter, amend or clarify should be rejected because the Summary Judgment Order contains all the necessary information for enforcement, and therefore, it was not an abuse of the trial court's discretion to reject the Motion to Reconsider.

RESPECTFULLY SUBMITTED this 28 day of February, 2006.



John H. Romney
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 17 day of March, 2006, I caused to be sent via first-class U.S. Mail, postage prepaid, two true and correct copies of the foregoing Appellee's Brief, addressed as follows:

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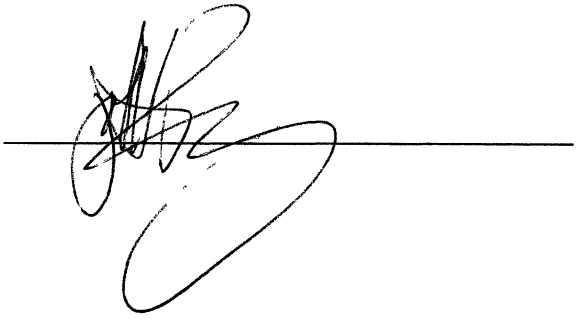

ADDENDUM

The following documents are attached:

Tab A

URCP Rule 7. Pleadings Allowed; Motions, Memoranda, Hearings, Orders, Objection to Commissioner's Order.

(f) Orders. (f)(1) An order includes every direction of the court, including a minute order entered in writing, not included in a judgment. An order for the payment of money may be enforced in the same manner as if it were a judgment. Except as otherwise provided by these rules, any order made without notice to the adverse party may be vacated or modified by the judge who made it with or without notice. Orders shall state whether they are entered upon trial, stipulation, motion or the court's initiative.

(f)(2) Unless the court approves the proposed order submitted with an initial memorandum, or unless otherwise directed by the court, the prevailing party shall, within fifteen days after the court's decision, serve upon the other parties a proposed order in conformity with the court's decision. Objections to the proposed order shall be filed within five days after service. The party preparing the order shall file the proposed order upon being served with an objection or upon expiration of the time to object.

Rule 59. New Trials; Amendments of Judgment.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Rule 60. Relief from Judgment or Order.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order ,or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Tab B

URAP Rule 4. Appeal as of right: when taken.

(a) Appeal from final judgment and order. In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from. However, when a judgment or order is entered in a statutory forcible entry or unlawful detainer action, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 10 days after the date of entry of the judgment or order appealed from.

Rule 33. Damages for delay or frivolous appeal; recovery of attorney's fees.

(a) Damages for delay or frivolous appeal. Except in a first appeal of right in a criminal case, if the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney's fees, to the prevailing party. The court may order that the damages be paid by the party or by the party's attorney.

(b) Definitions. For the purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law. An appeal, motion, brief, or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief, or other paper.

(c) Procedures

(c)(1) The court may award damages upon request of any party or upon its own motion. A party may request damages under this rule only as part of the appellee's motion for summary disposition under Rule 10, as part of the appellee's brief, or as part of a party's response to a motion or other paper.

(c)(2) If the award of damages is upon the motion of the court, the court shall issue to the party or the party's attorney or both an order to show cause why such damages should not be awarded. The order to show cause shall set forth the allegations which form the basis of the damages and permit at least ten days in which to respond unless otherwise ordered for good cause shown . The order to show cause may be part of the notice of oral argument.

(c)(3) If requested by a party against whom damages may be awarded, the court shall grant a hearing.

Tab C

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Utah.
Margaret NIGOHOSIAN, Plaintiff and Appellee,
v.
Robert NIGOHOSIAN, Defendant and Appellant.
No. 20020606-CA.

April 15, 2004.

Third District, Salt Lake Department; The Honorable William B. Bohling.

Douglas G. Mortensen, Salt Lake City, for Appellant.

Jay L. Kessler, Magna, for Appellee.

Before Judges BENCH, GREENWOOD, and ORME.

MEMORANDUM DECISION (Not For Official Publication)

PER CURIAM:

***1** Husband appeals the decree of divorce and supporting findings of fact and conclusions of law signed and filed by the court. He asserts on appeal that the documents are not in conformity with the agreements stated on the record at a pretrial hearing before the court.

In February 2002, the trial court held a pretrial hearing in this divorce case. At the hearing, the parties reached agreement on many key issues and stated the agreements on the record. Wife's counsel was assigned to prepare documents reflecting the result of the hearing.

Wife's counsel served a divorce decree and supporting findings of fact and conclusions of law on Husband's counsel, accompanied by a signed certificate of service. Receiving no timely objections to the documents, the trial court signed the documents. The documents were filed with the clerk on June 19, 2002.

Husband timely filed a notice of appeal. He also filed a motion to set aside the judgment, or to correct clerical error, pursuant to Utah Rule of Civil Procedure 60(a) and (b). [FN1] In both his rule 60 motion and appeal, Husband asserts that the documents entered by the trial court do not conform to what transpired on the record in the February hearing.

> FN1. A trial court has jurisdiction to consider a motion under Utah Rule of Civil Procedure 60(b) while an appeal is pending. *See Baker v. Western Sur. Co.,* 757 P.2d 878, 880 (Utah Ct.App.1988). Husband's rule 60 motion was a proceeding separate from the proceedings leading to the divorce decree appealed in this case. This court's "power of review is strictly limited to the record presented on appeal." *Gorostieta v. Parkinson,* 2000 UT 99,¶ 16, 17 P.3d 1110. Although some confusion exists among the parties, the record of the proceedings in the parallel rule 60 motion is not before this court on the appeal of the divorce decree, and is not considered for the purposes of this appeal.

Rule 4-504 of the Code of Judicial Administration provides that counsel for a party obtaining a ruling shall draft and file with the court a "proposed order, judgment, or decree in conformity with the ruling." Utah Code Jud. Admin. R4-504(1). Copies of the proposed documents must be served on the opposing party. *See id.* R4-504(2). The opposing party must notify the court and counsel of any objections to the documents within five days of

service. *See id.* This presents opposing counsel with the opportunity to review proposed documents and assure that they are "in conformity" with what transpired in court. *Id.* R4-504(1).

Husband waived his opportunity to challenge on appeal whether the decree, findings of fact, and conclusions of law were in conformity with the agreements reached on the record in the February hearing because he failed to object timely to the form of the documents under rule 4-504. *See Evans v. State,* 963 P.2d 177, 180 (Utah 1998). To preserve for appeal the issue of whether the written order of the court is in conformity with what transpired on the record, a party must first object to the form of the documents pursuant to rule 4- 504. *See id.* (holding State waived issue of inconsistent language in court's written order because of failure to timely object to the language under rule 4-504).

Husband argues that he did not waive the issue of the conformity of the documents to the record. He asserts that his trial attorney explained why there were no timely objections filed at a motion hearing on October 25, 2002. However, that hearing is part of the subsequent rule 60 proceeding and is not before this court.

Husband also argues that there was no waiver because the documents did not have an "approved as to form" line signifying review and approval. However, implying the necessity of an approval line is contrary to the rule. The rule squarely places the burden to object, not to approve, on counsel, with a prescribed time in which to do so. *See* Utah Code Jud. Admin. R4-504(2). [FN2]

> FN2. Husband also asserts that no objection to the documents was necessary to preserve appeal under *Dugan v. Jones,* 724 P.2d 955 (Utah 1986). Both *Dugan* and rule 52(b) of the Utah Rules of Civil Procedure state that no trial objection is necessary to preserve for appeal a question of sufficiency of the evidence supporting a finding. *See Dugan,* 724 P.2d at 956. Here, however, the challenge is to the conformity of the documents with the stipulations entered on the record, not sufficiency of the evidence. *Dugan* is thus inapplicable.

***2** Furthermore, as a factual matter, Husband has not affirmatively shown that the decree and findings of fact and conclusions of law were inconsistent with what transpired at the hearing in February 2002. *See Evans,* 963 P.2d at 180 (stating appellate courts will presume language in trial court's order is correct unless affirmatively shown otherwise). Husband offers conclusory and self-serving statements that the parties' intent was different than what is reflected, supported only by his own proposed amended documents. Additionally, one of his challenges to the documents, the waiver of past-due amounts and attorney fees, appears clearly set forth in finding of fact number 24 and conclusion of law number 19.

Accordingly, we affirm.

Not Reported in P.3d, 2004 WL 797721 (Utah App.), 2004 UT App 116

END OF DOCUMENT

Tab D

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IN THE SEVENTH JUDICIAL DISTRICT COURT OF CARBON COUNTY

STATE OF UTAH

ROBERT RADAKOVICH, individually and ROBERT RADAKOVICH and ELLEN R. RADAKOVICH TRUSTEES OF THE ROBERT RADAKOVICH MARITAL AND FAMILY TRUST, Plaintiffs, vs. MATTIE CORNABY, AL CORNABY, individuals, and WILLIAM ARGYLE CORNABY TRUST and MATTIE CORNABY TRUST, and JAY BARNEY CORNABY, DALE BARNEY, GAYLENE C. ROSENTHAL, ALBERT CORNABY, TRUSTEES Defendants.	**ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, GRANTING PLAINTIFFS' MOTION TO STRIKE, AND DENYING DEFENDANTS' COUNTERMOTION FOR SUMMARY JUDGMENT** Case No. 020700486 *Judge Bryce K. Bryner*

This matter came before the Court on oral arguments on Plaintiffs' Motion for Summary Judgment, Plaintiffs' Motion to Strike, and Defendants' Counter-Motion for Summary Judgment. The Court having heard oral arguments of the parties, having reviewed the memoranda filed on this

matter by both parties, having reviewed the papers and pleadings on file herein, having reviewed the relevant facts and case law, and otherwise being fully advised in the premise, now ORDERS, ADJUDGES AND DECREES:

1. Plaintiffs' Motion for Summary Judgment is granted;

2. Plaintiffs' Motion to Strike the Affidavit of Mattie Cornaby is granted as to paragraphs 7, 8, 9, 10, 11, 12, 14, and 15;

3. Plaintiffs' Motion to Strike the Supplemental Affidavit of Mattie Cornaby is granted;

4. Defendants' Counter-Motion for Summary Judgment is denied;

5. The right of way which now exists and has existed for many years, and which provides access to the Plaintiffs' property over the Defendants' property, is confirmed as and shall be sixty feet wide throughout its length;

6. Plaintiffs are entitled to construct fences marking the sixty foot wide right of way from the entrance of the right of way to the point at which it accesses Plaintiffs' property;

7. Defendants are ordered to remove any obstacles impeding or lying in the sixty foot wide right of way;

8. Defendants are to pay Plaintiffs' costs in the amount of $225.81.

DATED and SIGNED this 24th day of February, 2005.

BY THE COURT

Judge Bryce K. Bryner

Approved as to Form:

David Maddox

JOHN H. ROMNEY, #9160
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IN THE SEVENTH JUDICIAL DISTRICT COURT OF CARBON COUNTY

STATE OF UTAH

ROBERT RADAKOVICH, individually and ROBERT RADAKOVICH and ELLEN R. RADAKOVICH TRUSTEES OF THE ROBERT RADAKOVICH MARITAL AND FAMILY TRUST, Plaintiffs, vs. MATTIE CORNABY, AL CORNABY, individuals, and WILLIAM ARGYLE CORNABY TRUST and MATTIE CORNABY TRUST, and JAY BARNEY CORNABY, DALE BARNEY, GAYLENE C. ROSENTHAL, ALBERT CORNABY, TRUSTEES Defendants.	**RULE 7(F)(2) MAILING CERTIFICATE** Case No. 020700486 *Judge Bryce K. Bryner*

Please take notice that the undersigned will submit the above and foregoing ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, GRANTING

PLAINTIFFS' MOTION TO STRIKE, AND DENYING DEFENDANTS' COUNTER-MOTION FOR SUMMARY JUDGMENT for signature upon the expiration of five (5) days from the date of this notice, plus three (3) days for mailing, unless written objection is filed prior to that time, pursuant to Rule 7(f)(2) of the Utah Rules of Civil Procedure, which true and correct copy of the foregoing Order was mailed on the 8 day of February, 2005, postage prepaid, to:

David R. Maddox
1108 West South Jordan Pkwy, Ste A
South Jordan, UT 84095

829 South 220 East
Orem, UT 84058

JEFFS & JEFFS, P.C.

Brittany Garcia

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IN THE SEVENTH JUDICIAL DISTRICT COURT OF CARBON COUNTY

STATE OF UTAH

ROBERT RADAKOVICH, individually and ROBERT RADAKOVICH and ELLEN R. RADAKOVICH TRUSTEES OF THE ROBERT RADAKOVICH MARITAL AND FAMILY TRUST, Plaintiffs, vs. MATTIE CORNABY, AL CORNABY, individuals, and WILLIAM ARGYLE CORNABY TRUST and MATTIE CORNABY TRUST, and JAY BARNEY CORNABY, DALE BARNEY, GAYLENE C. ROSENTHAL, ALBERT CORNABY, TRUSTEES Defendants.	**FINDINGS OF FACT AND CONCLUSIONS OF LAW** Case No. 020700486 *Judge Bryce K. Bryner*

This matter came before the Court on oral arguments on Plaintiffs' Motion for Summary Judgment, Plaintiffs' Motion to Strike, and Defendants' Counter-Motion for Summary Judgment. The

Court heard oral arguments of the parties, reviewed the memoranda filed on this matter by both parties, reviewed the papers and pleadings on file herein, made its rulings dated the 31st day of January 2005. The Court granted the Plaintiffs' Motion to Strike, granted the Plaintiffs' Motion for Summary Judgment, and denied the Defendants' Counter-Motion for Summary Judgment.

The Court has considered all memoranda submitted by the parties, the arguments presented at hearing, the relevant case law and statutory provisions, and being fully advised in the matter and having issued its Memorandum Decision on January 31, 2005, now issues the following:

FINDINGS OF FACT

1. Paragraphs 7 and 11 of the Affidavit of Mattie Cornaby are conclusory and are not supported by specific evidentiary facts.

2. Paragraphs, 8, 9, 10, 12, 14, and 15 are conclusory, are not supported by specific evidentiary facts, and are not based on personal knowledge.

3. The Supplementary Affidavit of Mattie Cornaby does not effect paragraphs 7, 8, 9, 10, 11, 12, 14 and 15 of the original Affidavit of Mattie Cornaby and is self-serving.

4. The Warranty Deed from H.B. Simonsen to the Robert Radakovich conveyed real property, together with a 60 foot right of way.

5. In 1968, a dispute arose between Robert Radakovich and Elrie Simonsen regarding the location of the division line between their properties.

6. The width of the right of way at issue in this litigation was not addressed, nor was it in dispute in the 1968 litigation.

7. The issue presented for determination by the court in 1968 was the location of the division line between the two properties, not the width of the right of way.

8. The only issue addressed by the court was the division line between the north property (owned by Elrie and Bertha Simonsen) and the south property (owned by H.B. Simonsen's successor, Robert Radakovich).

9. The width of the right of way issue presented in this litigation is not identical to the issue presented in the 1968 litigation.

10. The width of the right issue presented in this litigation was not completely, fully and fairly litigated in the 1968 litigation.

11. The deeds referred to in Plaintiffs' Motion for Summary Judgment establish the existing right of way as being sixty (60) feet in width throughout its length.

12. The Affidavits in support of Plaintiffs' Motion for Summary Judgment establish the existing right of way as being sixty (60) feet in width throughout its length.

13. The 1968 court referred to a "fenced right of way" for convenience purposes only, and not as a limitation as to the width of the right of way.

14. There is no genuine issue of material fact regarding the sixty (60) foot width of the right of way.

CONCLUSIONS OF LAW

1. Paragraphs 7, 8, 9, 10, 11, 12, 14, and 15 and 11 of the Affidavit of Mattie Cornaby should be stricken.

2. The Supplementary Affidavit of Mattie Cornaby should be stricken.

3. The issue preclusion branch of res judicata does not apply to the present litigation.

4. The claim preclusion branch of res judicata does not apply to the present litigation.

5. The Defendants' Cross-Motion for Summary Judgment should be denied.

6. Because there is no genuine issue of material fact regarding the sixty (60) foot wide right of way, the Plaintiffs' are entitled to summary judgment.

7. The right of way which now exists and has existed for many years, and which provides access to the Plaintiffs' property over the Defendants' property, is confirmed as and shall be sixty feet wide throughout its length;

8. Plaintiffs are entitled to construct fences marking the sixty foot wide right of way from the entrance of the right of way to the point at which it accesses Plaintiffs' property;

9. Defendants are required to remove any obstacles impeding or lying in the sixty foot wide right of way;

10. Defendants are to pay Plaintiffs' costs.

DATED and SIGNED this 24th day of February, 2005.

BY THE COURT

Judge Bryce K. Bryner

Approved as to Form:

David Maddox

Tab F

IN THE SEVENTH DISTRICT COURT IN AND FOR CARBON COUNTY, STATE OF UTAH

ROBERT RADOKOVICH, individually and ROBERT RADAKOVICH and ELLEN R. RADAKOVICH TRUSTEES OF THE ROBERT RADAKOVICH MARITAL AND FAMILY TRUST,	)	**RULING ON MOTIONS FOR SUMMARY JUDGMENT**
Plaintiffs,	)	
VS.	)	
MATTIE CORNABY and AL CORNABY, et al.	)	Case No. 020700486
Defendants.	)	Judge Bryce K. Bryner

The plaintiffs filed a *Motion for Summary Judgment* on June 7, 2004, to which the defendants filed a *Memorandum in Opposition*. A *Reply* was filed by the plaintiffs. The defendants filed a *Counter Motion for Summary Judgment* and the plaintiffs filed a *Memorandum in Opposition* to which the defendants filed a *Reply*. The court heard oral on both motions for summary judgment, took the motions under advisement, and now issues the following rulings:

I. Relief Requested

The plaintiffs' motion requests the court to: (1) confirm the existence of a sixty foot right-of-way in favor of the plaintiffs; (2) order the defendants to allow the plaintiffs to construct fences marking the sixty foot right of way; (3) order the defendants to remove any obstacles impeding the sixty foot wide right of way; (4) award costs; and (5) to grant any other and further relief as may be proper.

The defendants' *Counter Motion for Summary Judgment* requests the court to: (1) dismiss the plaintiffs' Amended Complaint on the basis that all issues in dispute pursuant to the Plaintiffs' First Amended Complaint are barred by the doctrine of res judicata; (2) deny

plaintiffs' Motion for summary Judgment; (3) for costs and expenses; and (4) for such other and further relief as may be just and proper in the premises.

II. Ruling

A. *Defendants' Motion for Summary Judgment*: The defendants claim that res judicata preludes the relief quested by the plaintiffs in their Amended Complaint. The court finds that the doctrine of res judicata does not apply to this case because the issue of the size of the right of way was not addressed in the 1968 litigation. A close reading of the memorandum decision reveals that the court was not determining the size or the location of the right of way. The issue presented for determination by the court in 1968 was the location of the division line between the two properties. Although the court in its decision acknowledged the existence of a right of way which was located between two fence lines, it did not address the width of the right of way because the width was not in issue. The only issue addressed by the court was the division line between the north property (owned by Elrie and Bertha Simonsen) and the south property (owned by H.B. Simonsen's successor, Robert Radakovich).

Specifically, the second element of *issue preclusion* requires that the issue decided in the prior adjudication be identical to the one presented in the first action. Because the width of the right of way was not litigated in the 1968 lawsuit, but is the subject of the present litigation, defendants cannot succeed on the claim of *issue preclusion.* The issue presented in the present litigation, i.e., the actual width of the right of way, is not identical to the issue presented in the first action.

The court further finds that an examination of the court's decision in 1968 reveals that not only was the issue of the width of a right of way not addressed, it was not completely, fully, and fairly litigated as required by the third element of *issue preclusion.*

To succeed on *claim preclusion* the defendants must establish three elements, the second of which requires the claim that is alleged to be barred to have been presented in the first suit or be one that could and should have been raised in the first suit. Once again, the court finds that the issue of the width of the right of way was not presented in the first suit which addressed only the

location of the dividing line between the two properties. As to whether the issue of the right of way could and should have been presented in the first suit, no evidence has been produced that the parties had a dispute about the width of the right of way at the time of the first suit. Thus, there is no evidence that the width of the right of way should have been litigated at the time of the first suit. Accordingly, the defendants cannot avail themselves of the doctrine of *claim preclusion.*

Based on the foregoing the court concludes that res judicata is not applicable under the circumstances of this case and the defendants' Counter Motion for Summary Judgment on that basis is denied.

B. *Plaintiffs' Motion for Summary Judgment*: The plaintiff's *Motion for Summary Judgment* is granted for the reason that the court finds that there is no genuine issue of material fact, i.e., the width of the right of way. The affidavit of Mattie Cornaby has been stricken and the defendants have raised no genuine issue of material fact as to the width of the right of way. The deeds referred to in plaintiffs' Motion for Summary Judgment and the four undisputed affidavits furnished by plaintiffs establish the right of way as being 60' in width. Although the 1968 court referred to the "fenced right of way" for convenience purposes, the defendants have not produced any evidence that the right of way is not 60' in width.

The plaintiffs' Motion for Summary Judgment is granted. Plaintiffs' counsel is directed to prepare a Summary Judgment in harmony with this ruling.

DATED this 31st day of January, 2005.

Bryce K. Bryner, Judge

CERTIFICATE OF NOTIFICATION

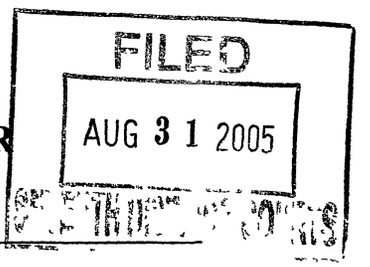
I certify that a copy of the attached document was sent to the following people for case 020700486 by the method and on the date specified.

METHOD	NAME
Mail	DAVID R MADDOX ATTORNEY DEF 1108 W SOUTH JORDAN PKWY STE A SOUTH JORDAN, UT 84095
Mail	JOHN H ROMNEY ATTORNEY PLA 90 N 100 E PROVO UT 84601

Dated this 1st day of February, 2005.

H Brundage
Deputy Court Clerk

Tab G



IN THE SEVENTH DISTRICT COURT IN AND FOR CARBON COUNTY, STATE OF UTAH

ROBERT RADOKOVICH, individually and ROBERT RADAKOVICH and ELLEN RADAKOVICH TRUSTEES OF THE ROBERT RADAKOVICH MARITAL AND FAMILY TRUST,	)	**RULING ON MOTION TO CLARIFY AND/OR RECONSIDER**
Plaintiffs,	)	
VS.	)	
MATTIE CORNABY and AL CORNABY, et al.	)	Case No. 020700486
Defendants.	)	Judge Bryce K. Bryner

The court issued a ruling on the parties' respective motions for summary judgment on January 31, 2005, and directed plaintiffs' counsel to prepare a summary judgment consistent with the ruling. A Summary Judgment was signed by the court on February 24, 2005, after the defendants' time to object had expired. On March 14, 2005, the defendants filed a *Motion to Clarify and/or Reconsider* to which the plaintiffs filed an *Objection*. A *Reply* was filed and the court heard oral argument on June 2, 2005, and allowed both counsel additional time to submit additional memorandum. The court took the *Motion to Clarify and/or Reconsider* under advisement and the matter is ripe for decision.

Although the Utah Rules of Civil Procedure do not recognize motions to reconsider, the Supreme Court of Utah in Shipman v. Evans, 100 P.3d 1151, n. 5. (Utah 2004), acknowledged that "extraordinary circumstances may arise when it is appropriate to request a trial court to reconsider a ruling." However, the court cannot find that extraordinary circumstances exist in this case that would justify a reconsideration. The Motion to Clarify and/or Reconsider is denied.

DATED this 31st day of August, 2005.

Bryce K. Bryner, Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 020700486 by the method and on the date specified.

METHOD	NAME
Mail	DAVID R MADDOX ATTORNEY DEF 1108 W SOUTH JORDAN PKWY STE A SOUTH JORDAN, UT 84095
Mail	JOHN H ROMNEY ATTORNEY PLA 90 N 100 E PROVO UT 84601

Dated this 2nd day of September, 2005.

Deputy Court Clerk